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March 9, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Ex Parte
CC Docket No 98-184

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. Section 1.1206, I am providing the attached Comments of KMC Telecom, Inc. filed yesterday in File No. AAD 98-24 concerning compliance by Bell Atlantic with the conditions placed on the Bell Atlantic/NYNEX merger. Footnote 15 of those comments addresses the proposed Bell Atlantic/GTE merger pending in the above-captioned proceeding.

Four copies of this letter and attachments are enclosed.

Sincerely,

Patrick Donovan

Patrick Donovan

cc: Janice Myles

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Bell Atlantic Progress Report on Compliance	)	
with Bell Atlantic/NYNEX	)	File No. AAD 98-24
Merger Order Conditions	)	

COMMENTS OF KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC") respectfully submits these comments concerning the report filed by the Bell Atlantic Corporation ("Bell Atlantic")[1] concerning its compliance with the conditions imposed by the Commission on its merger with NYNEX Corporation.[2]

KMC is authorized to provide, through its subsidiaries, competitive local and long distance services in 18 states, and Puerto Rico, and is operational in eleven states (Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Minnesota, North Carolina, Texas, Virginia, and Wisconsin). KMC has installed state-of-the-art networks in Huntsville, Alabama; Melbourne, Pensacola, Sarasota & Tallahassee, Florida; Savannah and Augusta, Georgia; Topeka, Kansas; Baton Rouge and Shreveport, Louisiana; Greensboro and Winston-Salem, North Carolina;

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[1] "Report of Bell Atlantic on Compliance with Merger Conditions" filed February 1, 1999. *See Public Notice*, Commission Seeks Comment on Bell Atlantic's Progress report on Compliance with Bell Atlantic/NYNEX Merger Order Conditions, DA 99-296, File No. AAD 98-24 (February 5, 1999).

[2] *NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997) ("*Bell Atlantic/NYNEX Merger Order*").

Corpus Christi, Texas; Roanoke, Virginia; and Madison, Wisconsin, and will build similar networks in several other cities in the Southeast and Midwest.

I. THE MERGER CONDITIONS HAVE NOT BEEN, AND WILL NOT BE, EFFECTIVE IN PROMOTING COMPETITION IN THE BELL ATLANTIC REGION

In the *Bell Atlantic/NYNEX Merger Order*, the Commission found that Bell Atlantic bore the burden of proving that, on balance, the merger would enhance and promote, rather than eliminate or retard, competition.[3] The Commission found that the applicants had not met that burden because the merger would eliminate the merger partners as potential competitors in each others' region and because it would enhance their ability to resist competition.[4] However, the Commission found that conditions proposed by Bell Atlantic enabled it to find that the proposed transaction, as supplemented by the conditions, would serve the public interest, although this remained a close call.[5] In its *Public Notice* soliciting comment on Bell Atlantic's progress report, the Commission asked interested parties to present views on the effectiveness of the conditions placed on the Bell Atlantic/NYNEX merger authorization in promoting competition in the post-merger Bell Atlantic region.[6]

KMC submits that a careful assessment of the merger conditions will show that they have not contributed to the development of competition in Bell Atlantic's region. Bell Atlantic

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[3] *Bell Atlantic/NYNEX Merger Order*, 12 FCC Rcd 19985.

[4] *Id.*

[5] *Id.*

[6] *Public Notice* at 1.

continues to enjoy the overwhelming percentage of customers and revenue. Competitive local exchange carriers ("LECs") had less than 1.4% of total switched access revenues in 1997.[7] Less than 0.02% of all buildings are connected to competitive LEC networks.[8] In addition, Regional Bell Operating Companies have approximately 99% of switched access lines[9], and incumbent LEC facilities dwarf competitive LEC facilities.[10] By any measure, competitive LECs have only a very small percentage of the local market.[11]

Morever, to the extent competition has grown in the Bell Atlantic region since the merger, this is not attributable to the merger conditions, but to the overarching regulatory requirements of the Communications Act, state requirements, and enforcement efforts of federal and state regulators and the efforts of competitors to contest vigorously Bell Atlantic's and other incumbent LECs' efforts to thwart competition.

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7 *1998 Annual Report on Local Telecommunications Competition*, 9th Edition, New Paradigm resources Group, Inc., Chapter 4, Table 5, at 8.

8 Letter to Secretary, Federal Communications Commission, from Donald H. Sussman, MCI Telecommunications Corporation, May 15, 1998, CC Docket No. 96-262, page 5, citing MCI market research.

9 *Id.*

10 As of 1996, incumbent LECs had installed 12.3 million miles of fiber whereas competitive LECs had installed only 1.3 million miles of fiber. *1997 Statistics of Communications Common Carriers*, Common Carrier Bureau, Federal Communications Commission, December 5, 1997, Table 12.

11 Collectively, competitive LECs captured 5.1% of the business market for local telecommunications services in 1997. *United States Competitive Local Markets*, Strategis Group (1998). In 1996 the CAP/CLEC share of nationwide local service revenues, including local exchange and access services, was 1%. Industry Analysis Division, Telecommunications Industry Revenue: TRS Fund Worksheet Data (rel. Nov. 1997).

Moreover, the merger conditions have not been effective in promoting competition because they leave ample opportunity for Bell Atlantic to thwart competition. KMC continues to experience difficulties in obtaining nondiscriminatory access to interconnection and network elements, including nondiscriminatory access to operations support systems ("OSS") from Bell Atlantic - precisely what the merger conditions were intended to prevent.

OSS Systems. Bell Atlantic's OSS systems, including its graphical user interface ("GUI"), are deficient in that they do not provide for a smooth transfer of customers from Bell Atlantic to KMC. In particular, Bell Atlantic's OSS does not provide for prompt notification to KMC -- or, apparently, even to critical operational units within Bell Atlantic -- of the completion of the transfer of a customer from Bell Atlantic to KMC. Thus, KMC and Bell Atlantic may agree that a customer that KMC intends to service via resale will be transferred as of a certain date, the customer is then apprized of that date, but KMC then frequently receives notice via the GUI of the transfer only several days or weeks after the transfer that the transfer occurred on that date. At the same time, Bell Atlantic also does not provide prompt notice of the transfer to its own internal billing operations so that Bell Atlantic frequently continues to bill the customer for the period after the transfer was stated in the notice of completion to have taken place. In one case, Bell Atlantic has continued to bill a customer for the period since November 4, 1998 even though it provided notice to KMC that service was transferred as of that date.

Resale of Contract Service. Notwithstanding its obligation under Section 251(c) of the Communications Act of 1934, as amended "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of ... telecommunications service ... "[12], Bell Atlantic has refused to permit KMC to resell services provided under contract service arrangements ("CSAs") to a customer without imposing termination penalties on the customer. In other words, when a Bell Atlantic customer under an existing CSA seeks to switch to KMC as its service provider and KMC seeks to obtain resale of the CSA from Bell Atlantic, Bell Atlantic will not do so unless termination penalties are paid. KMC submits that this practice is unreasonable and unlawful because Bell Atlantic will continue to be the underlying service provider and there is no genuine termination of service that would justify the imposition of termination penalties. Thus, Bell Atlantic does not experience any disruption to its service provision plans or stranded investment that are incumbent LECs' traditional justification for termination penalties.[13]

It is also evident that the conditions should be updated in light of regulatory developments. Post-*AT&T Corp. v. Iowa Utilities Board*,[14] incumbent LECs are raising a host of new issues and threats to hinder competition. These include denial of "opt-in" rights, rejection of obligations to provide UNEs and combinations of UNEs, and intransigence in providing intraLATA toll dialing parity. Morevoer, incumbent LECs are hindering competition in provision of advanced services by flatly refusing to provide conditioned loops, sub-loop

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12 47 U.S.C. Sec. 251(c).

13 KMC has filed a petition with the State Corporation Commission for the Commonwealth of Virginia asking that this practice be proscribed. KMC Telecom of Virginia, Inc. v. Bell Atlantic-Virginia, Inc., filed November 19, 1998.

14 119 S. C.t. 721 (1999).

unbundling, and by refusing to permit loop spectrum sharing. None of these matters are directly addressed by the current conditions.

KMC submits, therefore, that the initial conditions imposed in the merger will fall far short of being effective on a going-forward basis to promote competition, as they have since the merger was approved. Accordingly, the Commission should conclude that the merger conditions have not been, and will not be, effective in promoting competition.

II. THE COMMISSION SHOULD DETERMINE THAT THE MERGER, AS PRESENTLY CONDITIONED, WILL NOT SERVE THE PUBLIC INTEREST

As noted, the Commission determined in the *Bell Atlantic/NYNEX Merger Order* that the merger would not serve the public interest except for the anticipated beneficial affect of the merger conditions in promoting competition. KMC submits that because the merger conditions have not, and will not, promote competition, the Commission should conclude that the merger as presently conditioned does not serve the public interest. Therefore, the Commission should consider further measures at this time to assure that the merger will serve the public interest on a going-forward basis.

III. THE COMMISSION SHOULD IMPOSE FURTHER CONDITIONS

KMC believes that the Bell Atlantic/NYNEX merger should not have been approved. However, it is not realistic to expect that Bell Atlantic would be amenable to "unscrambling the egg" or that the Commission would find this a practical alternative. Instead, the Commission should impose further conditions at this time in an attempt to assure that the approval of this merger will serve the public interest.[15]

Incentives for Performance of Interconnection Agreements. KMC urges the Commission to establish as a condition to the merger self-enforcing incentives for Bell Atlantic to meet its obligations under interconnection agreements. In particular, the Commission should provide that, when Bell Atlantic delays cutting over a customer to KMC by failing to meet scheduled dates for the cut over or when it fails to provide dates for the cut over on a timely basis, the customer would be immediately treated as a resale customer of the competitive LEC with a 65% discount. This would provide incentives for Bell Atlantic promptly to transfer customers to KMC when the customer has elected to receive service from KMC. This proposal was provided to the Commission in a February 1, 1999 letter from KMC which is attached hereto.

Performance Standards. The Commission should impose performance standards concerning interconnection, OSS, collocation, resale and provision of UNEs. These standards should be designed to assure that Bell Atlantic's processes and procedures for meeting its obligations under the Act are adequate to permit new entrants to enter local service markets free from the practical difficulties they currently encounter as described above.

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[15] Although KMC believes that the most practical step at this point concerning the Bell Atlantic/NYNEX merger is to impose further conditions, KMC does not believe that the best approach concerning the pending Bell Atlantic/GTE merger is to approve that transaction with conditions. Instead, the public interest would be best served by denial of approval of that transaction because experience concerning the Bell Atlantic/NYNEX merger has not shown that it has not served the public interest.

Penalties. The Commission should establish penalties that would be imposed when Bell Atlantic fails to meet performance standards in a specified number of instances. These penalties could take the form of fines payable to the United States Treasury and should be material enough to encourage performance within applicable standards.

IV. CONCLUSION

For these reasons, KMC urges the Commission to determine that the Bell Atlantic/NYNEX merger as presently conditioned has not served the public interest and that it impose the further conditions described above.

Respectfully submitted,

Patrick J. Donovan

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Dated: March 8, 1999

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Michael A. Sternberg
President and
Chief Executive Officer

February 1, 1999

Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Re: KMC TELECOM INC.'S PROPOSAL FOR INCENTIVES FOR PERFORMANCE OF SECTION 251 AGREEMENTS

Dear Chairman Kennard:

I am writing to you on behalf of KMC Telecom Inc. ("KMC"), a competitive local exchange carrier ("CLEC"), to propose that the Commission explore and adopt additional incentives that will encourage the incumbent local exchange carriers ("ILECs") to comply with their obligations under the Telecommunications Act of 1996.

KMC and its affiliates are currently providing facilities-based local exchange service in competition with the ILECs in eleven states. KMC has 23 fiber networks in place that serve approximately 50 cities. KMC has entered each new market as a reseller of the ILEC's service. Upon completing construction of its own networks, KMC has made its facilities-based local service available to its customers. To extend the reach of its networks, KMC purchases unbundled elements ("UNEs"), principally loops, from the ILECs. Unfortunately, it has been KMC's experience that the ILECs repeatedly miss due dates scheduled for installation of UNEs and fail to properly coordinate conversions of unbundled loops and interim number portability ("INP"). When due dates are missed and conversions are mishandled, KMC's business reputation and its ability to compete suffers.

While a great deal of effort has been expended on both the federal and state levels evaluating various methods for measuring the ILECs' performance of their obligations under the Telecommunications Act, little has been done (outside of the Section 271 context) to create incentives for the ILECs to comply with those obligations. KMC submits that the proposal outlined below will create such incentives and hopefully will convince the ILECs that it is in their business interests to treat CLECs in a nondiscriminatory manner.

KMC Telecom
Creative Solutions with a Hometown Touch

Introduction

Section 251 of the Telecommunications Act of 1996 created a duty for ILECs to provide other telecommunications carriers with a variety of services and facilities for their use in offering competitive local exchange services. These duties include, among other things: (1) interconnection to the ILEC's network at any technically feasible point; (2) access to unbundled network elements, including local loops, signaling, databases, operator services, switching and transport functionalities; and (3) the ability to resell basic local exchange services and all optional services and features at a wholesale discount.

Although the Telecommunications Act created these legal duties, it left the details of enforcing them to negotiation between carriers and/or arbitration by state public utility commissions. The first three years of experience under the Act have shown that effective enforcement provisions are critical. The Act creates an inherently unstable situation – ILECs are required by law to provide services and facilities to "customers" who will use these offerings to compete against them. They have no incentive, other than the threat of regulatory discipline, to provide a high quality of service to their competitors. As a result, CLECs have suffered from slipshod ordering practices, delayed installations, missed appointments, lack of coordination in customer cut-overs resulting in service disconnections, and a host of other service disruptions. Both the Commission and various state commissions have recognized repeatedly that the ability of CLECs to compete with and win customers from an ILEC is seriously impaired when the ILEC engages in such service-affecting practices.

To succeed in the competitive marketplace, facilities-based CLECs need access to the ILEC's UNEs to fill in gaps in their network coverage. Resale is an effective market entry vehicle that can be used to develop a customer base until a CLEC has constructed its own network. Because of the relatively small wholesale discounts, however, resale yields very slim margins and is not likely to prove profitable in the long run. The recent financial troubles experienced by USN, one of the first resellers in the market, demonstrate that turning a profit on resale is an uphill (and perhaps unwinnable) battle. For this reason, it has become more and more difficult for CLECs that are not facilities-based to raise capital. Even for facilities-based CLECs, Wall Street wants assurances that CLECs can win customers from the ILECs and serve them over their own networks. Access to capital dries up when CLECs are unable to demonstrate that they can migrate customers to their own networks. Investors focus on the bottom line and are unmoved by complaints that the ILECs are to blame for hampering the CLECs' ability to convert customers more quickly and transparently. If capital is not available to CLECs, the goals of the Telecommunications Act will not be realized.

The legal obligations imposed on ILECs by the Telecommunications Act have not proven sufficient to incent ILECs to provide an acceptable level of service to CLECs. KMC submits that the time is ripe for trying a new approach that will convince ILECs that providing good service to CLECs makes good business and economic sense.

A New Approach To Incenting Better Performance

The performance standards (to the extent there are any) contained in the first generation of interconnection agreements (many of which are due to expire this year) do not adequately address the actual problems associated with ordering and provisioning UNEs and INP that CLECs have encountered in their day to day dealings with ILECs and are generally so lax that ILECs would have to expend a lot of effort not to be in compliance. As a result, the remedies provided for specified performance breaches, which are usually in the form of liquidated damages, are not readily available so as to incent the ILECs to improve their performance or treat CLECs like the large wholesale customers that they are, rather than as competitors.

In an effort to induce ILECs to improve their UNE and INP ordering and provisioning processes, more precise performance standards and stronger remedies must be incorporated into interconnection agreements and/or state and federal regulations to incent the ILECs to comply with their obligations under the Telecommunications Act. KMC submits that, in order to achieve the desired effect, the remedies must be self executing and must be triggered immediately when an ILEC fails to meet a minimum level of performance. In addition, the remedies must be tailored to compensate the CLEC for the lost revenues and loss of customer good will that result when the ILEC (1) fails to provide a CLEC with a timely firm order commitment (FOC) specifying a due date for installing an unbundled loop, other UNE or INP or, (2) fails to meet the due date specified in a FOC.

Performance standards and remedies are the subject of regulatory proceedings pending before the FCC and a number of state commissions. The proposals being debated include the nature of the standards, acceptable deviations from parity requirements, reporting requirements and (on the state level at least) penalties for failure to comply with performance benchmarks. All of the pending proposals contemplate legal or regulatory solutions to what is a very real business issue. In the competitive marketplace, businesses do not perform because of the threat of legal or regulatory penalties for failure to perform. Businesses perform to make money and improve the bottom line. KMC believes that regulators and industry members must recognize this fact of life in the context of implementing incentives to improve ILEC compliance with installation due dates. Adopting a business, rather than a legal, solution to a business problem is likely to do more to discourage anticompetitive behavior on the part of the ILECs than any threat of regulatory penalties.

Both the end user and the CLEC suffer when an ILEC fails to meet a scheduled due date. In contrast, the ILEC benefits from any delays in migrating a customer to a CLEC's service by continuing to collect revenues from the customer. One mechanism for alleviating the inconvenience to the customer, avoiding the potential for lost revenues to the CLEC, and for ensuring that the ILEC does not profit from delays in cutting a customer over to a CLEC's service is to require ILECs who fail to meet scheduled due dates or who fail to provide timely FOCs to immediately convert the affected customer to the CLEC's resale service until the cut over is completed. When customers are converted to a CLEC's resale service under these circumstances, the wholesale discount should be 65% off of the retail rate for the service. Although this "incentive" discount is significantly higher than the resale rate applicable in any jurisdiction, it approximates the margin a CLEC would realize when providing local exchange service using its own network facilities in combination with UNEs obtained from the ILEC. As such, it would serve to compensate the CLEC for the revenues lost as a result of the ILEC's delays in provisioning the UNEs.[1] In addition, the ILEC should be required to waive nonrecurring charges for any UNEs not provided by the scheduled due date.

KMC's proposal is consistent with remedies being implemented by various state commissions designed to incent ILECs to meet performance standards and benchmarks in connection with their efforts to meet the nondiscrimination and parity requirements of Section 271 of the Telecommunications Act. For example, in New York, Bell Atlantic has agreed to increase the wholesale discount and to reduce UNE prices for CLECs to which it provides below-standard service over a thirty day period. In Texas, Southwestern Bell has agreed to a two tier penalty structure for failure to meet due dates. Under the first tier, Southwestern Bell must pay CLECs liquidated damages to remedy the specific harm caused by its failure to perform. Under the second tier, Southwestern Bell must pay fines to the Texas State Treasury when its overall performance falls below a certain level and adversely affects competition.

Whether the financial penalties adopted in New York and Texas will succeed in incenting the ILECs to improve their performance in delivering UNEs to CLECs remains to be seen. KMC submits that its proposal represents a refinement of the approaches adopted in New York and Texas that will produce pro-competitive results more rapidly. KMC's proposal has several advantages over the New York and Texas remedies. First, it is self executing and provides immediate relief to the CLEC and the end user. Second, it will reduce litigation time and costs by eliminating the need for CLECs to bring claims for damages caused by the ILECs' failure to meet performance standards before state or federal regulatory agencies or courts. Finally, it helps to minimize the harm caused to CLECs and end users even if the ILECs do not improve their performance. By requiring the ILEC to convert the CLEC end user to resale service at a 65% discount immediately when a due date is missed, (1) the CLEC is able to earn the margin it would otherwise have realized had the UNEs been timely provided, (2) the end user is able to begin receiving service from the local exchange carrier of its choice on the due date promised, and (3) the ILEC is denied at least some of the financial benefits that accrue from continuing to provide service to the end user beyond the scheduled due date.

KMC submits that implementation of its proposal will go a long way toward qualifying the RBOCs for interLATA relief under Section 271 of the Act. One common thread running through every Commission decision denying the RBOCs Section 271 relief is the RBOCs' failure to make access to their operating support systems ("OSS") available to CLECs on a nondiscriminatory basis, a factor which the FCC has repeatedly found significantly impairs competition. Ordering and provisioning are OSS functions on which the RBOCs consistently have come up short. Because KMC's proposal would significantly reduce the anticompetitive impact of an RBOC's failure to meet a scheduled due date or provide a timely FOC, RBOC entry

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[1] The wholesale discount should revert to the normal rate if and when the ILEC is prepared to install the service originally ordered by the CLEC or if the CLEC fails to accept that service or prevents the installation.

into the interLATA market could be hastened where the RBOC incorporates KMC's self executing proposal into its interconnection agreements and fully complies with the requirements.

A New Approach To Promoting Competition In The Residential Market

Almost three years after the passage of the Telecommunications Act, there is almost no facilities-based competition in the residential market. The biggest factor contributing to the lack of competition is the expense of constructing facilities, especially loops, to serve residential customers. While ILECs often accuse CLECs of engaging in cream-skimming by targeting their marketing efforts to the more lucrative business market, the uncertainty surrounding the ILECs' obligation to combine UNEs for CLECs and the ILECs' right to separate UNEs has hampered the development of competition in the residential market. Where the ILEC refused to do the combining or insisted on separating UNEs, a CLEC was required to collocate in every central office in which it wanted access to UNEs, thereby significantly increasing its capital expenses.

Because an RBOC must demonstrate that at least one competitor is providing facilities-based service to residential customers in order to qualify for Section 271 relief, the absence of facilities-based competition will continue to frustrate the RBOCs' efforts to enter the long distance market. The RBOCs could remedy this situation by agreeing to combine UNEs for CLECs that use the UNEs to serve residential customers. Although the Supreme Court's recent decision in the Iowa Utilities Board case would seem to mandate this result, the decision has raised new questions relating to the access to UNES that ILECs must make available. KMC submits that, until the latter issue has been resolved by the Commission, a voluntary commitment by the ILECs to continue providing access to the UNEs defined in the Commission's (now vacated) Rule 319 will make it more economically feasible for facilities-based CLECs to serve the residential market through a combination of their own facilities and UNEs purchased from the ILEC.

KMC urges the Commission to institute a proceeding to implement these business-oriented proposals to promote the development of facilities-based local competition.

Respectfully submitted,

Michael A. Sternberg
President and Chief Executive Officer

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Larry Strickling, Esq.

CERTIFICATE OF SERVICE

I, Valerie M. Steen, hereby certify that on this 8th day of March, 1999, I served a copy of the foregoing Comments of KMC Telecom Corporation in File No. AAD 98-24 by hand delivery or first-class mail on the following active parties:

Valerie M. Steen

Valerie M. Steen

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